

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**EFIGENIA ZAPATA**

Claimant

VS.

**IBP, INC.**

Respondent

Self-Insured

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Docket Nos. 168,208 & 168,209

**ORDER**

Respondent appealed from the February 27, 1998, Award entered by Administrative Law Judge Jon L. Frobish. The Appeals Board heard oral argument on October 23, 1998. Jeff K. Cooper served as Appeals Board Member Pro Tem in place of Appeals Board Member Gary Korte who recused himself from this proceeding.

**APPEARANCES**

Claimant appeared by her attorney, Diane F. Barger of Wichita, Kansas. Respondent appeared by its attorney, Gregory D. Worth of Lenexa, Kansas.

**RECORD AND STIPULATIONS**

The Appeals Board reviewed and considered the record set forth in the Award. In addition, the Appeals Board considered the February 15, 1996 IME report, which was filed March 26, 1996, and the supplemental report of the April 8, 1996 examination, both by Pedro A. Murati, M.D. The Appeals Board has not considered the attachments to claimant's brief that were not a part of the record considered by the ALJ. The Appeals Board adopted the stipulations listed in the Award, together with the stipulation at oral argument to the admission of the supplemental report by Dr. Murati.

**ISSUES**

The ALJ found claimant's functional impairment percentage to be 5.5 percent and awarded claimant permanent partial disability compensation based upon the 5.5 percent to the body as a whole for the back injury claim in Docket No. 168,208. The ALJ awarded claimant a 58.25 percent work disability in Docket No. 168,209, finding claimant's

unsuccessful vocational rehabilitation plan and inability to secure a job paying a comparable wage did not invoke the policy considerations set forth in Fouk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). Respondent appeals that finding and requests Appeals Board review of the findings and conclusions concerning the nature and extent of claimant's disability and average weekly wage in Docket No. 168,209 only. Although respondent also appealed from the award in Docket No. 168,208, respondent later sought to withdraw that appeal. At oral argument claimant announced she had no issues to raise in either docketed claim. Therefore, the ALJ's award in Docket No. 168,208 will be affirmed.

Docket No. 168,209

#### **FINDINGS OF FACT**

(1) In June of 1992, claimant began to notice problems in her hands and arms. Claimant continued to work at her regular job until she was given light duty restrictions. She was eventually taken off work by Dr. Lynn D. Ketchum on April 7 or 8, 1993. During this period, claimant's problems with her hands and arms got worse. The ALJ found the last day claimant worked for respondent before leaving work due to her injuries was April 8, 1993. Following the guidelines of Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994), the ALJ found the date of accident for this series of accidents to be April 8, 1993. This finding has not been challenged on appeal and will be adopted by the Board.

(2) Dr. Knappenberger, a board certified orthopedic surgeon, first examined claimant on July 7, 1992. He was authorized by respondent to treat claimant's back and his testimony pertains to the back injury, which was the subject of Docket No. 168,208. Dr. Knappenberger did not examine claimant's upper extremities. His findings and restrictions, therefore, are not relevant to this claim except as they may impact claimant's post-injury labor market.

(3) Claimant received authorized medical treatment for her upper extremities from Dr. Campbell and Dr. Ketchum. Claimant refused the recommended carpal tunnel release surgery on her left upper extremity. Thereafter, claimant was released with permanent restrictions of no lifting over 10 pounds and no repetitive gripping or pulling. He rated claimant's functional impairment as 8 percent to the right upper extremity and 7 percent to the left upper extremity for an 8 percent to the body as a whole. Respondent did not have any work available within those restrictions.

(4) In addition to the testimony of the treating physicians, Dr. Ketchum and Dr. Kurt Knappenberger, the court ordered an IME by Dr. Murati. The record also contains the deposition testimony of evaluating physician Dr. Sergio Delgado.

(5) Dr. Murati rated each upper extremity at 5 percent for a 3 percent whole person permanent impairment. He recommended permanent work restrictions that included no crawling, no repetitive heavy grasping, no work more than 18 inches from the body, no use of hooks or knives, and limit pushing, pulling, lifting or carrying to 20 pounds occasional, 10 pounds frequent and 5 pounds constant.

(6) Claimant was examined by Dr. Delgado on September 19, 1995 at the request of her attorney. Dr. Delgado is a board certified orthopedic surgeon. He diagnosed bilateral carpal tunnel syndrome with persistent neuropathy of the median nerve at the wrist bilaterally. Dr. Delgado rated claimant's upper extremities as having a combined 12 percent permanent impairment of function to the body as a whole. He recommended permanent restrictions limiting claimant to work in a 20-pound range in most positions on a repetitive basis, but also said she should avoid repetitive activities, working in cold environments or with vibratory tools. He likewise agreed with the recommendations by Dr. Ketchum of no repetitive pushing, pulling, twisting, or grasping motions with either arm or hand; no use of vibratory tools or working in cold environments. She should avoid repetitive lifting over 10 pounds and single lifts over 15 pounds with either arm or hand. Dr. Delgado further opined that claimant's injuries to her upper extremities were due to her previous occupation as a meat cutter with respondent.

(7) As the medical restrictions prevented claimant from returning to her previous employment and respondent was unable to accommodate the restrictions, vocational rehabilitation was implemented. A plan was approved for a job search but that plan also mentioned reeducation and training as a possibility. As part of the plan claimant was to seek employment which would not return her to comparable wage. Because of claimant's inability to speak English and inability to read or write in English, reeducation and training was deemed inappropriate. Due in part to problems associated with her pregnancy, claimant was unable to complete the vocational plan. In addition to her pregnancy, claimant also missed job search opportunities for other personal reasons including not having a telephone and transportation problems.

(8) A mediation hearing was held on July 27, 1995 and, as a result, another vocational rehabilitation plan was attempted. However, this plan was also unsuccessful and was closed due to claimant's noncompliance. Claimant pointed to her language barrier and child care problems as the primary reasons for this plan's failure.

(9) At the time of her November 30, 1995 deposition, after the vocational rehabilitation plan was closed, claimant testified she was looking for work on her own.

(10) Respondent presented the testimony of vocational counselor Gary Gammon. Based upon the restrictions recommended by all the doctors, Mr. Gammon opined that claimant had lost 54.56 percent of her ability to perform work in the open labor market. He testified that claimant's loss of ability to earn a comparable wage was 20 percent based upon his

opinion that her post-accident wage earning ability was \$6.00 per hour or \$240 per week. However, when comparing that wage earning ability figure to the average weekly wage, including fringe benefits, of \$397.20, the loss is 40 percent. Mr. Gammon's opinion that claimant could earn \$6.00 per hour doing cashier or customer service work is not credible given her language barrier and lack of education.

(11) Claimant presented the testimony of vocational expert Monte Longacre. Based primarily upon the permanent restrictions imposed by Dr. Murati and Dr. Delgado, Mr. Longacre opined that claimant's ability to perform work in the open labor market has been reduced by between 57 percent and 65 percent. He determined that her ability to earn comparable wages has been reduced 51 percent based upon post-accident earnings of \$174 per week as compared to the \$355.44 he used for her earnings at the time of her injury. Comparing \$174 a week to the average weekly wage of \$404.31 as found by the ALJ, yields a wage loss of 57 percent. But when the sum \$397.20 is used for the average weekly wage, the loss is 56 percent.

#### CONCLUSIONS OF LAW

The ALJ found claimant's average weekly wage was \$404.31 in both docketed claims based upon hourly straight time pay of \$8.39 times 40 hours for a weekly base wage of \$335.60 plus weekly average of \$23.39 in overtime, \$11.87 bonuses, \$27.81 other fringe benefits, and \$5.64 in other wages. Respondent argues claimant's average weekly wage was instead \$397.20, using the same \$335.60 base wage but only \$61.60 for average weekly overtime and additional compensation. Following the figures presented in claimant's Exhibit No. 1 to the July 11, 1996 Regular Hearing, the Appeals Board finds claimant's average weekly wage in Docket No. 168,209 to be \$397.20.

Because hers is an unscheduled injury, claimant is entitled to permanent partial disability benefits based upon K.S.A. 1992 Supp. 44-510e(a) which states:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence. There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury.

Giving equal weight to the restrictions recommended by Dr. Murati and Dr. Delgado and based upon the opinions of Monte Longacre using these two physicians' restrictions, the ALJ found claimant's loss of ability to obtain work in the open labor market is 59.5 percent. Likewise, the ALJ adopted Mr. Longacre's opinion concerning claimant's post accident wage earning ability to find claimant's wage loss to be 57 percent. The average of those two figures, 58.25 percent, was determined to be claimant's percentage of work disability. Although the Appeals Board finds a slightly higher average of the percentages of labor market loss and a slightly lower wage loss, the ALJ's award is within the accepted range of opinions.

In Foulk, the Kansas Court of Appeals found that a claimant who refused to even attempt an accommodated job which had been offered to her that was within her restrictions and paid a wage comparable to that which she was earning at the time of her accident should be precluded from receiving an award for work disability. The Court then imputed the comparable wage which claimant would have earned had she accepted the employment and applied the presumption of no work disability found in K.S.A. 1991 Supp. 44-510e(a).

The Appeals Board finds claimant's conduct was not a willful or deliberate attempt to manipulate the workers compensation system or a refusal to take full advantage of vocational rehabilitation benefits that may have enabled her to return to work at or near a comparable wage. Therefore, the public policy considerations announced in Foulk do not apply to the facts in this case. Claimant's attempts to find employment have been unsuccessful. But neither would the vocational plan have returned her to earning a comparable wage. And since claimant has not worked for wages comparable to those she was earning at the time of her accident the presumption of no work disability contained in K.S.A. 1992 Supp. 44-510e does not apply. Furthermore, there is no basis for imputing a comparable wage to invoke that presumption. Accordingly, a work disability should be awarded as provided by statute. Following the formula approved in Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990) giving approximately equal weight to the loss of labor market and loss of ability to earn comparable wages the Appeals Board affirms the ALJ's 58.25 percent work disability award.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish dated February 27, 1998, should be, and is hereby, modified to find an average weekly wage of \$397.20 in Docket No. 168,209 but is otherwise affirmed.

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Efigenia Zapata, and against the respondent, IBP, Inc., a qualified self-insured, for an accidental

injury which occurred April 8, 1993, and based upon an average weekly wage of \$397.20 for 415 weeks at the rate of \$154.25 per week or \$64,013.75, for a 58.25% permanent partial general disability.

As of April 26, 1999, there is due and owing claimant 315.57 weeks of permanent partial compensation at the rate of \$154.25 per week in the sum of \$48,676.67, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$15,337.08 is to be paid for 99.43 weeks at the rate of \$154.25 per week, until fully paid or further order of the Director.

The Appeals Board adopts the remaining orders contained in the ALJ's Award not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of April 1999.

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BOARD MEMBER PRO TEM

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BOARD MEMBER

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BOARD MEMBER

c: Diane F. Barger, Wichita, KS  
Gregory D. Worth, Lenexa, KS  
Jon L. Frobish, Administrative Law Judge  
Philip S. Harness, Director